EDITOR'S NOTE

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84-6270

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS
CLERK

ORIGINAL

JOHNNY GREEN, GAIL BLESSING, THERESA E. COVEYOU, GILDA MILLS, and JUDGE MILLS on behalf of themselves, their children, and all others similarly situated,

Petitioners,

v

AGNES MARY MANSOUR, Director, Michigan Department of Social Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

DOES THE ELEVENTH AMENDMENT BAR ISSUANCE OF AN ORDER REQUIRING QUERN TYPE NOTICE WHERE, AS A RESULT OF A CHANGE IN FEDERAL LAW, THE PARTY SEEKING THE NOTICE RELIEF LACKED THE GROUNDS FOR, AND NO LONGER SOUGHT, INJUNCTIVE RELIEF?

JURISDICTION AND APPLICABLE PROVISIONS OF LAW

Respondent, Mansour, accepts Petitioners' statements regarding jurisdiction under 28 U.S.C. § 1254(1) and applicable provisions of law set out in their Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASES

Because Petitioners' Statement of the Cases is incomplete and somewhat misleading, Respondent presents this Counterstatement of the Cases in the same format as the Court of Appeals Opinion appearing at 742 F.2d 277. The Petitioners Johnny Green and Gail Blessing are two-named Plaintiffs from the suit challenging the Michigan Department of Social Services' [MDSS] policies relating to the provision of day care benefits for employed Aid to Families With Dependent Children [AFDC] recipients captioned, in the District Court, Michigan Welfare Rights Organization, et al v John T. Dempsey. [Day Care Expense Litigation]. The remaining three Petitioners, Theresa E. Coveyou, Gilda and Judge Mills are three of the original nine named Plaintiffs from the litigation challenging MDSS's treatment of stepparent income in the AFDC program captioned Carol Banas, et al v John T. Dempsey. [Stepparent Income Litigation].

A. Day Care Expense Litigation

Petitioners Green and Blessing waited until January 29, 1982, four months after the federal law change mooted out any possible prospective relief, to seek summary judgment on their claim of violation of pre-October 1, 1981, federal law. Respondent, Director of Social Services, on February 1, 1982, responded with a Motion to Dismiss on grounds of mootness and the jurisdictional bar of the Eleventh Amendment. It was not until February

9, 1982, that Petitioners sought again to certify a class in this cause, exactly thirteen months to the day from the District Court's issuance of a Memorandum Order denying class certification for lack of an adequate or typical representative.

At the March 9, 1982, hearing on Petitioners' motions for summary judgment and class certification and Respondent's motion to dismiss, Petitioners made no claim that state law violated the Social Security Act's child care expense provisions after October 1, 1981. Petitioners' counsel admitted, on the record, that the claims for declaratory and notice relief, if valid at all, related solely to benefits allegedly lost prior to October 1, 1981.

On June 22, 1982, the District Court denied Petitioners' motions for summary judgment and class certification and granted Respondent's motion to dismiss the action. Petitioners jointly appealed from that decision and the decision in the stepparent income litigation discussed in Section B, infra, to the Sixth Circuit which affirmed both in its August 22, 1984, Opinion and Judgment.

B. Stepparent Income Litigation

While Petitioners Coveyou and Mills, husband and wife, have included most of the facts from the Court of Appeals Opinion relative to the stepparent income litigation, they have omitted certain pertinent facts.

For example, the Opinion noted that the parties stipulated, as a result of the October 1, 1981, federal law change, to amend the preliminary injunction making its prospective effect valid only up to October 1, 1981. Banas v Dempsey, 742 F.2d 277, 280 (6th Cir. 1984). The amended preliminary injunction, com-

porting with the parties' stipulation, was issued by the District Court on October 21, 1981. In February, 1982, some four months later and nine months after filing suit, Petitioners' counsel finally sought a hearing on the motion for class certification which had been filed at the same time as the motion for preliminary injunction.

On March 9, 1982, Respondent filed a motion to dismiss arguing that the action was rendered moot by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any orders sought by Petitioners.

Petitioners responded to the motion on April 9, 1982, with their motion for summary judgment, seeking a declaration that MDSS's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in Quern v Jordan, 440 U.S. 332 (1979).

At the hearing conducted on April 13, 1982, Petitioners' counsel admitted that the change in federal law mooted their claims for injunctive relief after October 1, 1981. They further admitted that none of the named Petitioners nor any member of the putative class, to their knowledge, had lost any benefits allegedly owed to them under the pre-October 1, 1981, law. (Transcript, April 13, 1982, pp. 34-35. Appendix pp. 1-2) Nevertheless, Petitioners did not abandon their motions for class certification and summary judgment.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying Petitioners' motions for summary judgment and class certification and granted Respondent's motion

to dismiss the action. Petitioners appealed this decision jointly with the decision in the day care expense litigation and the Sixth Circuit affirmed. See Banas v Dempsey, supra.

Petitioners now seek a writ of certiorari to the Sixth Circuit. Respondent opposes the issuance of the writ as the Sixth Circuit's Opinion and Judgment is consistent with the decisions of this Court, particularly Quern v Jordan, supra. Further, the decisions of the Fourth, Fifth and Ninth Circuits, cited by Petitioners as supposedly being in conflict with that of the Second and Sixth Circuits, are based upon factual circumstances which do not exist in the case at bar.

ARGUMENT

I.

THE DECISION BELOW IS CONSISTENT WITH CONTROLLING DECISIONS OF THIS COURT RELATIVE TO THE ELEVENTH AMENDMENT.

In both the day care expense and stepparent income litigation the Petitioners sought and were denied declaratory judgments that the Director of Social Services had acted contrary to federal law which ceased to exist effective October 1, 1981. These judgments were sought as a predicate to the issuance of notice similar in content to that approved by this Court in Quern v Jordan, supra.

The Sixth Circuit ruled that the issuance of the requested notice is barred by the Eleventh Amendment because the notice sought in this case, unlike Quern v Jordan, supra, could not be ". . . ancillary to the prospective relief already ordered by the court." Quern, 440 U.S. at 349. In the case at bar, from the time the federal law changed on October 1, 1981, there

existed no prospective relief the District Court could afford Petitioners as had been afforded in Quern, supra, and Ex parte Young, 209 U.S. 123 (1908). Therefore, they lacked the essential prerequisite, consistent with the Eleventh Amendment, for the issuance of Quern type notice.

Petitioners suggest the Sixth Circuit inappropriately relied on Cory v White, 457 U.S. 85 (1982) in rendering the decision below. The Court of Appeals, however, was merely expanding upon this Court's holding in Pennhurst State School and Hospital v Halderman, ___ U.S. ___, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) where Justice Powell, speaking for the majority said:

> ". . . And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. See Cory v White, 457 U.S. 85, 91, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982)." Pennhurst, ___ U.S. at ___, 104 S.Ct. at 909, 79 L.Ed.2d at 79.

This Court has used what it admits to be the "fiction" of Ex parte Young, supra, to determine what relief federal courts may provide consistent with the Eleventh Amendment. Pennhurst, supra, 104 S.Ct. at 911, 79 L.Ed.2d at 82.

In Ex parte Young, supra, this Court held that an unconstitutional enactment is "void" and thereby does not "impart to the state official any immunity from responsibility to the supreme authority of the United States." Young, 209 U.S. at 160. Therefore prospective injunctive relief was issued to require the state official, the Minnesota Attorney General, to conform his conduct to the federal constitution and this relief was not considered to violate the sovereign immunity of the state as embodied by the Eleventh Amendment.

The Quern Court characterized the notice relief approved by the Seventh Circuit as being ". . . on the Ex parte Young, supra, side of the Eleventh Amendment line rather than on the Edelman [v. Jordan, 415 U.S. 651 (1974)] side." Quern, 440 U.S. at 347. This was so because the chain of causation linking the federal court's notice relief with any monetary award "contains numerous missing links which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court." Id. at 347. This Court went on to state:

> "The Notice approved by the Court of Appeals, unlike that ordered by the District Court is more properly viewed as ancillary to the prospective relief already ordered by the court. See Milliken v Bradley, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue." Quern, 440 U.S. at 349 (emphasis added)

In the present cases, at the time the District Court was asked to certify a class and afford relief to members of that class, there was no Young prospective injunctive relief Petitioners sought or to which they were entitled. The prospective injunctive relief, to which the Quern notice was ancillary, had been issued to a certified class in 1972. See Jordan v Weaver, No 71 C 70, judgment (N.D. Ill. March 15, 1972) and opinion (N.D. Ill. Feb. 4, 1972) discussed in Edelman v Jordan, 415 U.S. 651 (1974). The Sixth Circuit said:

> ". . . Thus, at the time the District Court dismissed the complaints, the foundation that supports the granting of ancillary orders against state officials without violating the Eleventh Amendment - the basic injunction to enforce compliance with federal law - was not present under the circumstances of these cases." Banas, 742 F.2d at 287.

The Sixth Circuit further noted that:

> ". . . to escape the bar of the Eleventh

> Amendment, an order against state officials must be both 'prospective' and ancillary to a Young injunction ordering state officials to comply with federal law - the 'prospective - compliance exception.' Milliken, 433 U.S. at 289, 97 S.Ct. 2761. Because it is the fiction of Young that shelters such ancillary orders from not being orders against the state, when the basis of that fiction - the need for injunctive relief to force state officials to comply with federal law - disappears, so does the shelter." Id. at 288.

The decision below is entirely consistent with the decisions of this Court which have uniformly emphasized the importance of recognizing that the principle of sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. Pennhurst, ___ U.S. at ___, 104 S.Ct. at 906, 79 L. Ed. 2d at 72.

Therefore as the Sixth Circuit's decision is in accord with those of this Court, the Petition for Writ of Certiorari should be denied.

II.

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF EVERY OTHER CIRCUIT COURT OF APPEALS WHICH ADDRESSED THIS ISSUE.

In Colbeth v O'Rourke, 707 F.2d 57 (2nd Cir. 1983) the Second Circuit Court of Appeals affirmed the District Court's summary judgment for defendant, Commissioner of the Vermont Department of Social Welfare. The case involved the interpretation of certain sections of the Food Stamp Act, 7 U.S.C. §§ 2011-2029 (1976 & Supp IV 1980). As in the case at bar, a change in the relevant federal law, effectuated by a December, 1981, amendment to the Food Stamp Act, rendered Plaintiff's request for prospective injunctive relief moot before the September 2, 1982 hearing.

U.S. District Judge Coffrin in an Opinion and Order issued December 14, 1982, held, as did Judge Joiner below that the Eleventh Amendment barred the issuance of Quern type notice where such notice was not ancillary to and implementing prospective relief already ordered by the Court. Colbeth v Wilson, 554 F.Supp. 539, 546 (D.Vt. 1982).

Petitioners direct the Court's attention to the following cases from the Fourth, Fifth and Ninth Circuits contending, without basis, that the decisions of the Second Circuit in Colbeth v O'Rourke, supra, and that of the Sixth Circuit below somehow are in conflict with them. See Randall v Lukhard, 729 F.2d 966 (4th Cir. 1984) (en banc) cert. denied, ____ U.S. ___, 53 U.S. Law Week 3237 (Oct. 1, 1984); Silva v Vowell, 621 F.2d 640 (5th Cir. 1980) cert. denied, sub nom. Johnston v Silva, 449 U.S. 1125 (1981); and Beltran v Myers, 701 F.2d 91 (9th Cir. 1983) cert. denied sub. nom. Rank v Beltran, ___ U.S. ___, 103 S.Ct. 3115 (1983). Additionally Petitioners mention Simpson v Miller, 93 F.R.D. 540 (N.D. Ill. 1982) as a decision also in conflict with the case at bar.

The first case discussed by Petitioners involved a dispute over California's transfer of assets prohibition in the Medicaid program. In Beltran v. Myers, 451 U.S. 625 (1981), this Court remanded the case to the Ninth Circuit Court of Appeals for reconsideration of its decision, which had originally upheld the transfer of assets prohibition so as to afford Petitioner Beltran "...the opportunity to argue the validity of the California law under the new federal law - an issue that was not addressed by the parties in [the Supreme] Court." Beltran, 451 U.S. at 629. On remand, the District Court issued a preliminary injunction against Defendants enjoining them from "denying Medicaid eligibi-

lity to all plaintiffs who are applicants for and recipients of Medicaid on the basis of an alleged transfer of assets in any manner that is inconsistent with the transfer of assets provisions which are contained in Pub. L. 96-611, § 5, 94 Stat. 3767" Beltran v. Myers, No. 78-2350 CBM(Mx), preliminary injunction (C.D. Cal. July 30, 1981) [1981 Transfer Binder] CCH Medicare and Medicaid Guide ¶31,465 (Appendix, pp. 3-6). The later issuance of a Quern type notice was, in that case, ancillary to prospective relief to which Plaintiffs were still entitled after the change in federal law, unlike the case at bar.

The Ninth Circuit, in Beltran v Myers, 701 F.2d 91 (9th Cir. 1983) merely affirmed the District Court's jurisdiction on remand to vacate its earlier judgment and decide issues not previously decided. The appellate court affirmed the trial court's issuance of Quern type notice, as it was prospective in nature and ancillary to prospective injunctive relief which, at the time the notice was ordered, was not barred by the Eleventh Amendment. The District Court had jurisdiction in July, 1981 and thereafter to enjoin California's transfer of assets policy, which was claimed to be inconsistent with the new federal law. The notice relief was merely ancillary to such prospective injunctive relief.

A similar situation is presented in Randall v Lukhard, supra, involving a Medicaid transfer of assets prohibition which arose in the Fourth Circuit. Plaintiffs filed a class action on April 24, 1980, seeking declaratory and injunctive relief on the grounds that Virginia's transfer of assets rule violated Title XIX of the Social Security Act and the due process and equal protection clauses of the Fourteenth Amendment. Subsequently, the federal law was amended, effective July 1, 1981, to permit a

transfer of assets prohibition in certain circumstances. Virginia developed a new rule and Plaintiffs were allowed to amend their complaint to challenge the new rule as well as its predecessor.

In an Opinion and Order, issued April 16, 1982, on cross motions for summary judgment, Chief District Judge Turk held in part that: (1) the transfer of assets rule employed prior to July 1, 1981 violated the prior federal law and (2) the present policy of applying the two-year rule to applications and redeterminations filed before July 1, 1981 was also invalid. Three classes were certified, an injunction was issued barring the present policy declared invalid by the District Court, a declaratory judgment rendered and Virginia was required to give a Quern type notice to members of one of the classes who had been denied Medicaid benefits under the old transfer of assets rule. Randall v Lukhard, 536 F. Supp. 723 (W.D. Va. 1982)

On appeal, Randall v Lukhard, 709 F.2d 257 (4th Cir. 1983), a divided panel modified the notice ordered by the District Court so that it comported with Quern v Jordan, supra, stating:

> "The doctrinal dividing line between relief permissible under the Eleventh Amendment and relief barred by its reservation of sovereign immunity is, in the broadest form, that between prospective and retroactive relief. In Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908), the Supreme Court ruled that a federal court may order state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. But in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court held that the Eleventh Amendment bars suits by private parties seeking to impose a liability for the past conduct of state officers that must be paid from public funds in a state treasury.
>
> Between these two poles and most relevant to the present case is Quern v. Jordan, 440 U.S.

> 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). There, the district court had ruled that plaintiff applicants' federal rights in a public assistance program had been, and still were being, violated. As part of an order that also included prospective injunctive relief, the lower court required state officials to send a 'mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits.' Id. at 336, 99 S.Ct. at 1142, quoting 563 F.2d at 875. . ."
>
> As such, the Court found that the giving of notice - whose costs of preparation and mailing would be de minimis, see id. at 347 n. 19, 99 S.Ct. at 1148 n. 19 - was properly viewed as ancillary to the prospective relief already granted by the lower court, rather than as a retroactive award of funds. Id. at 349, 99 S.Ct. at 1149." Randall, 709 F.2d at 268-269 (emphasis added)

The Fourth Circuit, on rehearing en banc, Randall v Lukhard, 729 F.2d 966 (1984), adopted the majority position allowing, with a modification, the notice approved by the district court because it was issued "as part of an order that also included prospective injunctive relief" and was "properly viewed as ancillary to the prospective relief already granted by the lower court". Randall, 709 F.2d at 269.

Contrary to Petitioners' representation, the Fifth Circuit, in Silva v Vowell, supra, did not address the issue on which certiorari is sought here. In that litigation, unlike the case at bar, there was no federal law change which eliminated the need for a Young injunction. On that basis alone, Silva is distinguishable, since the instant case does not involve the question whether the Eleventh Amendment bars notice relief where state officials, without any change in the federal law, voluntarily alter challenged policies.

In any event, even the notice relief issued by the District Court in Silva v Vowell, supra, was ancillary to

prospective relief already ordered by the Court. The District Court, on December 19, 1978, granted summary judgment for the plaintiffs, invalidating Texas' sixty day eligibility requirement for AFDC. That requirement remained after other eligibility requirements were voluntarily deleted from Texas AFDC Handbook. On July 3, 1979, in the District Court's final judgment, a class was certified and Quern type notice ordered. At the time of the final judgment, the District Court ordered prospective relief and ancillary notice relief. The later ruling of the Fifth Circuit in Silva v Vowell, supra, reversing the District Court's earlier grant of summary judgment (holding the sixty day eligibility requirement unconstitutional) does not change the fact that when the notice was ordered, it, like the Quern notice, was ancillary to prospective injunctive relief previously ordered by the Court.

Clearly, the foregoing decisions of the Fourth, Fifth and Ninth Circuits are wholly consistent with and indeed adopt the same analysis of Quern v Jordan as relied upon by the Sixth Circuit in its decision below. Simpson v Miller, supra, also provides no support to Petitioners. Coming, as it does, out of the same circuit as Quern, supra, the Seventh Circuit, the District Court followed the practice approved by the Seventh Circuit regarding the issuance of such notice.

The Simpson case involved Illinois' methodology for determining AFDC earned income and the State's treatment of child care expenses. In Simpson, supra, the Illinois district court, in an opinion issued February 16, 1982, certified the following class:

> "All AFDC recipients in Illinois who since April 1, 1980, have been, are, or will be employed, and who have incurred, are incurring or will incur reasonable employment-related child care expenses which defendants have failed or refused to reimburse, in their actual amount prior to October 1, 1981, and in their actual amount up to $160 per month as of

October 1, 1981." Simpson, 93 F.R.D. at 547 (emphasis added)

At the time the class was certified, the Simpson Plaintiffs were, as in each of the cases discussed above, still seeking and, as the District Court later determined in its March 17, 1982, opinion, entitled to prospective relief which had not been mooted out by the amended federal law. Plaintiffs contended and the District Court agreed, that Illinois, in addition to acting in a manner contrary to pre-October, 1981, federal law was also violating post-October, 1981, law by not reimbursing for child care even up to the limits now provided by the amended Federal law.

Each of the cases Petitioners claim to be inconsistent with the case at bar, contains an element missing from the instant case: an existing order granting prospective injunctive relief to conform the state officials conduct to current federal law: a Young injunction. There is no conflict among the Circuit Courts of Appeal that this Court needs to resolve by issuing the requested writ of certiorari.

CONCLUSION

For all of the above reasons, this Court should deny the writ of certiorari to review the decision of the Sixth Circuit and the judgment of that Court should be affirmed.

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kp/2/banasb

APPENDIX

Excerpt from oral argument in Banas v Dempsey, pp. 34-35
(Sixth Circuit Joint Appendix pp A184-A185) A-1

District Court Preliminary Injunction Order
(July 30, 1981) Beltran v Myers A-3

done in five minutes then, your Honor.

THE COURT: How about ten minutes?

MR. ROSENBERG: Ten minutes, I can do it with no question.

THE COURT: All right.

MR. ROSENBERG: First, your Honor, numerosity question, we still don't know the circumstances of any of the named plaintiffs and I have asked, in my opening remarks that plaintiffs indicate those circumstances and all they can tell us is what the alleged class members, what's happened to some of them.

I would think that if they're that concerned, they would be concerned about the status of their own representative --

THE COURT: Let's find out.

What about that?

MR. DUNHAM: Well, your Honor, as to all the named plaintiffs, what occurred, they are, basically, in the category with -- using the category numbers on pages two and three of my brief, they're in the third category. In other words, they have received -- they have had no gap in their eligibility.

THE COURT: Had what?

MR. BURNHAM: No gap in eligibility because of the entry of a preliminary injunction.

In other words, what happened was they got a notice saying they would be cutoff; they requested hearings and at that point, the preliminary injunction was entered and, apparently, the defendant chose, at that point, to pay them back to June 1st. But, for some reason, did not, they did not lose actual benefits before June 1st because they were treated as a special case, or for whatever reason, we're not entirely sure.

THE COURT: May be own --

MR. BURNHAM: Carolyn Grat --

MR. ROSENBERG: Your Honor, I would suggest --

THE COURT: That's different. She applied, she was an applicant, you said?

MR. BURNHAM: No. Carolyn Grat was a recipient and was cut off.

THE COURT: Oh, I see.

MR. ROSENBERG: Your Honor, I would like the Court to draw its attention to the preliminary injunctive order and what it demanded the Department to do and what the Department has done, in relating to it and I think it's instructive to look at the

[Digest of Opinion]

New York—Liens and recoveries—Personal injury settlement—Treatment of agency lien after compromise.—The letter from the agency reducing its lien for medical assistance, which was relied upon by the court in reaching its compromise order, is binding upon the parties even though the agreement was based upon incomplete information as to the amount of assistance which had been expended on behalf of an infant recipient. Accordingly, it would be improper to set aside a compromise order which was entered into after acceptance of a letter from the agency, agreeing to compromise a $48,887 medical assistance lien for $30,000, notwithstanding the fact that the agency had expended an additional $77,125 which was not considered at the time the agency made its compromise offer.

It is undisputed that the agency has the power to reduce its lien and, in fact, it is a common practice where there is a recovery in an infant's personal injury action. This is particularly true where an infant's injuries are, as they are in this case, very serious, and it is not unusual to negotiate a reduction before a proposed compromise order is submitted to the court. The employee of the agency who made the compromise had the authority to do so because she was the party to whom the recipient's attorney had been referred, by the agency, to make the settlement. To hold otherwise would make every reduction of lien letter from the agency questionable. Even if it is true that there was an oversight by the agency as to $77,125 of its lien, this is no basis for vacating the reduction of the lien effected by the letter from the agency. The recipient has discharged his settlement obligation with the agency, as directed by the compromise order, and all of the litigants have changed their positions, barring a restoration to the status quo. *Back references*: ¶ 14,745.51, 15,620.

¶ 31,464 NEW YORK—FAIR HEARING—ADMISSIBILITY OF HEARSAY EVIDENCE

Margherita Rezoagli v. *Blum*, New York Supreme Court, Appellate Division, Second Judicial Department, Dec. 1, 1980; 79 AD 2d 607.

[Digest of Opinion]

New York—Fair hearing—Use of hearsay evidence.—Although administrative hearings are not limited to the strict rules of evidence applicable to a court of law, it is nonetheless basic that the administrative determination must be supported by some evidence, and an agency determination denying assistance must be reversed where the only evidence presented at the hearing was hearsay. Accordingly, an applicant was entitled to a grant of assistance for skilled nursing care where the reasons for the denial were a form filled out by the applicant's physician in which he erroneously marked the box recommending "related health care facility" and a caseworker's report containing a similar recommendation based on an interview with someone alleged to be a charge nurse at the skilled nursing facility.

The applicant submitted adequate documentation proving that her physician had erroneously and inadvertently checked the wrong box and that he subsequently submitted an amended form stating that the applicant needed skilled nursing care. The agency did not produce the maker of the report alleging the interview with the charge nurse, and the applicant had no opportunity to cross-examine anyone with personal knowledge of the facts contained in the report. The type of evidence presented at the hearing did not even approach minimum standards of fairness, and the determination denying assistance was arbitrary and capricious. *Back references*: ¶ 14,765, 15,620.

¶ 31,465 CALIFORNIA—TRANSFER-OF-ASSET PROHIBITION—CONFORMITY WITH FEDERAL LAW

Antonia Beltran et al v. *Beverley A. Myers*, U.S. District Court, Central District of California, No. 78-2350-CBM (Mx), July 30, 1981.

California—Conditions of eligibility—Financial eligibility—Transfer-of-asset prohibition—Conformity with federal law.—Under the federal transfer of asset law, the "Boren Long Amendment," if a state implements such a rule for Medicaid Purposes it cannot apply more restrictive provisions than are allowed in the application of the

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transfer rule to applicants for and recipients of Supplemental Security Income, except that the disqualification period may be longer under certain circumstances. Accordingly, enforcement of the Medi-Cal transfer of asset provision is preliminarily enjoined as being more restrictive and in direct conflict with existing federal law. Under Sec. 1613(b) of the Social Security Act, a presumption is created that, subject to certain exclusions, assets disposed of for less than full consideration within the preceding 24 months prior to filing an application for assistance should be included in the resources of an applicant for SSI benefits. The presumption can be overcome by "convincing evidence to establish that the transaction was exclusively for some . . . purpose" other than that of establishing eligibility.

The California transfer of asset rule conflicts with federal law in at least the following ways: (1) violates the federal requirement that only non-exempt resources which are transferred can trigger a denial of eligibility; (2) does not allow applicants to overcome the presumption that they have transferred assets in order to obtain eligibility by a showing of "subjective evidence," not even permitting applicants to show that they transferred assets to avoid probate or that they were not aware that Medi-Cal existed; (3) does not set a period of ineligibility which "bears a reasonable relationship to the uncompensated value" of the transferred resources and does not specify that, for transfers with uncompensated values of $12,000 or less, the period of ineligibility cannot be greater than two years; and (4) does not limit its application to transfers occurring within two years of application. Class action status is granted and the agency is preliminarily enjoined from enforcing an alleged transfer of asset rule in any manner inconsistent with the federal provision. *Back references*: ¶ 14,311.81, 15,560.

The decision of the U.S. Supreme Court which remanded this case is reported at 1981-1 Transfer Binder ¶ 31,050.

[Finding of Facts and Conclusions of Law]

MARSHALL, District Judge: 1. This case is before the District Court as a result of remands from the Supreme Court to the Court of Appeals on May 18, 1981, *Beltran v. Myers*, 101 S.Ct. 1961, and from the Court of Appeals to this Court on June 25, 1981. The mandate of the Court of Appeals was issued on June 30, 1981.

2. On May 10, 1979, this case was certified as a class action, with plaintiff Antonia Beltran as the representative plaintiff.

3. In its decision of May 18, 1981, the Supreme Court unanimously vacated the decision of the Court of Appeals (*Dawson v. Myers*, 622 F.2d 1304 (9th Cir. 1980)). The Court ordered that in light of a new federal statutory development, the case should be remanded for further consideration. "Petitioner [Beltran] should have the opportunity to argue the validity of the California law under the new federal law. . . ." *Beltran*, 101 S.Ct., at 1963.

4. The new federal legislation, Pub.L. 96-611, § 5, 94 Stat. 3567, was signed into law by the President on December 28, 1980.

5. Defendants have not, as of the date of the hearing in this matter (July 13, 1981) changed the California transfer of assets rule.

6. Since July 1, 1981, members of the class have been, and continue to be, denied Medi-Cal benefits as a result of the application by defendants of California's transfer of assets rule.

Conclusions of Law

1. The new federal transfer of assets law, Pub.L. 96-611, § 5 (the "Boren-Long Amendment") went into effect on July 1, 1981. *Beltran*, 101 S.Ct., at 1963.

2. The new law allows states, which so choose, to implement and apply a transfer of assets rule to applicants for and recipients of Medicaid (known in California as "Medi-Cal").

3. If a state implements such a rule, pursuant to Pub. L. 96-611, § 5(b), it cannot apply more restrictive provisions than are allowed in the application of the transfer rule to applicants for and recipients of Supplemental Security Income (SSI), pursuant to section 5(a) of Pub. L. 96-611, except for one expressly stated exception. See subsections 1902(a)(1), (2) of the Social Security Act, 42 U.S.C. § 1396a(a)(1), (2), as added by Pub. L. 96-611, § 5(b), 94 Stat. 3567.

4. California is reimbursed 50% of its Medicaid costs by the federal government under the cooperative scheme of the Medicaid statute, 42 U.S.C. § 1396b, 44 Fed. Reg. 10553 (1979).

5. Under this cooperative scheme, the state is required to comply with federal law. See *Harris v. McRae*, 100 S.Ct. 2671, 2680 (1980); *Schweiker v. Gray Panthers*, — U.S. —,

—, 49 U.S.L.W. 4792, 4793 (1981); accord *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

6. California's transfer of assets rule conflicts with the federal law, as it is more restrictive in at least several ways.

7. The California rule violates the requirement of the federal law that only non-exempt resources which *are* transferred can trigger a denial of eligibility. Section 1613(e)(1) of the Social Security Act, 42 U.S.C. §1382b, as added by Pub.L. 96-611, 5(a). That section, which prohibits the denial of SSI to an individual transferring an exempt resource, is incorporated into the Medicaid statute by the requirement that no more restrictive rule be used in determining Medicaid eligibility. Pub.L. 96-611, §5(b).

8. The California rule is also more restrictive *as* it does not allow claimants to overcome the presumption that they have transferred in order to obtain eligibility by a showing of "subjective evidence", specifically including a demonstration that they transferred either to avoid probate or that they were not *aware* that Medi-Cal even existed. 22 Cal.Admin.C. §50409. By contrast, the federal law sets as the standard for overcoming the presumption a presentation of "convincing evidence". 42 U.S.C. §1382b(c)(2). The federal law does not specify that only "objective evidence" can overcome the presumption, nor does it state that particular *reasons* are explicitly insufficient.

9. The California rule is also defective as it does not set a period of ineligibility which "bear[s] a reasonable relationship to [the] uncompensated value" of the transferred resource. 42 U.S.C. §1396a(a)(2). Its open-ended procedure can result in unusually lengthy periods of ineligibility. Moreover, the California rule does not specify that for transfers with uncompensated values of $12,000 or less, the period of ineligibility cannot be greater than two years, as the federal law requires. 42 U.S.C. §1396a(a)(2).

10. The California rule is also defective because it does not limit its application to transfers occurring within two years of application. Compare 22 Cal.Admin.C. §50409(b) with 42 U.S.C. §1382b(c)(1).

11. The California rule thus directly conflicts on at least several key points with the federal law. It is *more* restrictive than the federal law, and is thus impermissible under that law.

[Injunctive Relief]

12. The standard for issuance of a preliminary injunction in this circuit requires "that the moving party demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Los Angeles Memorial Coliseum Com'n v. Nat. Football*, 634 F.2d 1197, 1201 (9th Cir. 1980). Previous cases have made it clear that the test is a continuum, so that a strong showing of probable success or irreparable harm reduces the need for a strong showing at the other end of the spectrum. *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979); *Benda v. Grand Lodge of International Ass'n. of Machinist and Aerospace Workers*, 584 F.2d 308, 314-315, (9th Cir. 1978), cert. dism'd 441 U.S. 937 (1979).

13. In this case, plaintiff fully satisfies both aspects of the test. The California rule directly conflicts with the requirements of federal law on several key points. At the very minimum, plaintiff has presented "sufficiently serious questions going to the merits to make them a fair ground for litigation." The Supreme Court implicitly held as much in remanding this case. *Beltran*, 101 S.Ct. at 1963.

14. Moreover, serious and irreparable harm threatens the class members. The denial of Medicaid coverage, and its ultimate result, the loss of needed medical assistance, including comprehensive nursing home care, represents the most basic form of irreparable harm. As a District Court concluded in preliminarily enjoining New York's transfer rule: "[T]he very survival of these individuals and these class members in similar situations is threatened by a denial of medical assistance benefits during the pendency of these actions." *Caldwell v. Blum*, CCH MEDICAID AND MEDICARE GUIDE (1979-2 Transfer Binder) ¶ 30,093 at p. 9743 (S.D.N.Y. 1979), aff'd 621 F.2d 491 (2d Cir. 1980), cert. denied 49 U.S.L.W. 3894 (June 1, 1981); see also, e.g., *Burns v. Vowell*, 424 F.Supp. 1135, 1142 (S.D. Tex. 1976); *Bracco v. Lackner*, 462 F.Supp. 436, 453 (N.D.Cal. 1978); *Stein v. Mathews*, 430 F.Supp. 1065, 1068-1070 (D.N.J. 1977), aff'd 586 F.2d 250 (3d Cir. 1978).

15. The only harm accruing to defendants if the injunction is granted will be the requirement that they provide Medi-Cal coverage to individuals who would otherwise not be covered. This additional cost is not sufficient to override the significant harm threatened for the class members. The balance of hardships tips decidedly in plaintiff's favor. *Caldwell v. Blum*, *supra*, 621 F.2d, at 498-499.

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16. Plaintiff has therefore met the standard for the issuance of preliminary injunction and a classwide injunction will therefore issue, effective immediately.

[Preliminary Injunction]

This cause having come before this Court on order to show cause why this Court should not issue a preliminary injunction, dated July 15, 1981, and the Court having considered the pleadings and papers on file herein, written and oral argument of counsel and been fully advised in the matter,

IT IS HEREBY ORDERED

That defendants, Beverlee A. Myers, *et al*., their officers, agents, servants, employees, and those persons in active concert and participation with them are enjoined from denying Medicaid eligibility to all plaintiffs who are applicants for and recipients of Medicaid on the basis of an alleged transfer of assets in any manner that is inconsistent with the transfer of assets provisions which are contained in Pub. L. No. 97-35, § 2, 94 Stat. 3567.

Specifically: (1) only non-exempt resources which are transferred can trigger a denial of eligibility, (2) claimants will be allowed to overcome the presumption that assets have been transferred in order to obtain eligibility by the presentation of "convincing evidence," including subjective evidence, (3) the period of ineligibility for transfer with uncompensated values of $12,000 or less cannot be greater than two years and (4) the transfer of assets rule will apply to transfers occurring within two years of application only.

¶ 31,466 WISCONSIN—TRANSFER OF ASSET PROHIBITION—TRANSFER OF A HOME—CONFORMITY WITH FEDERAL LAW

Ann C. Gonzagowski et al. v. Donald E. Percy, U. S. District Court, Western District of Wisconsin, No. 81-C-297, Aug. 3, 1981.

Wisconsin—Conditions of eligibility—Financial eligibility—Transfer of asset—Transfer of home.—Assets which are exempt from a Medicaid eligibility determination when owned are equally exempt when divested and an agency regulation which denied assistance to any person who transferred any asset within two years prior to the application for medical assistance was contrary to state law. Accordingly, the agency could not deny an application for assistance where the applicant transferred her home, without consideration, by contending that the transfer was presumed to have been made in contemplation of receiving assistance.

Under Secs. 1613(b) and 1902(a) of the Social Security Act, a presumption is created that, subject to certain exclusions, assets disposed of for less than full consideration within the preceding 24 months prior to filing an application for assistance should be included in the resources of an applicant for Supplemental Security Income benefits. The presumption can be overcome by "convincing evidence to establish that the transaction was exclusively for some purpose" other than that of establishing eligibility. Under the exclusions to this presumption, the law provides that "in determining the resources of an individual (and his eligible spouse) no amount thereof shall be excluded [in the home context], the fact that application therefor . . ." The language of these statutes is susceptible to only one interpretation, that is, assets which are exempt when owned are equally exempt when divested. Class action status is conditionally granted, and the agency is preliminarily enjoined from denying medical assistance, in whole or in part, to applicants by reason of their having conveyed, transferred, or disposed of their homes for less than full consideration. *Back references*, ¶ 15,658, 24,419.

[Footnotes at end of decision]

Gibson, District Judge: This is a suit to obtain enforcement of a rule promulgated by the Wisconsin Department of Health and Social Services permitting the application of investment restrictions to the transfer of assets which, if not transferred, would be excluded from consideration in determining an applicant's eligibility for Medical Assistance. The named plaintiff, Ann Gonzagowski, began the action seeking a temporary restraining order and preliminary injunction on her own behalf and on behalf of similarly situated persons. Upon the settlement of plaintiff Gonzagowski's individual claims, plaintiff moved to add Mary Elizabeth Kaiser as party plaintiff. Defendants having expressed no opposition to the motion to add a plaintiff, its motion will be granted.